No. 83-458

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, AND UNITED STATES DEPARTMENT OF AGRICULTURE, PETITIONERS

v.

COMMUNITY NUTRITION INSTITUTE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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As we demonstrated in our opening brief, Congress enacted a carefully-constructed scheme for the orderly review of market orders at the behest of the parties regulated by those orders. Respondents, who are total strangers to the regulatory program, nevertheless seek to challenge restrictions imposed by the Secretary on the regulated parties, and they seek to do so in a manner that would make it unnecessary for the regulated parties ever again to follow the review procedures mandated by Congress. Respondents have offered no legitimate reason for visiting such disruption on Congress's chosen method for enforcement of the AMAA.[1]

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[1]Preliminarily, we note that respondents ask this Court to analyze the two issues presented by this case, preclusion of review and standing, in reverse order (Br. i). Respondents offer no explanation for their

1.a. In response to our argument (Pet. Br. 18-30) that the purposes and structure of the AMAA manifest a congressional intent to preclude consumer challenges to market orders, respondents contend (Br. 36-37, 41) that review is nevertheless available under Section 10(a) of the Administrative Procedure Act, 5 U.S.C. 702. Respondents largely choose to ignore the fact that the APA itself incorporates the preclusion doctrine by denying review whenever a relevant statute precludes it. 5 U.S.C. 701(a)(1). In other words, "[a] person is 'adversely affected or aggrieved . . . within the meaning of a relevant statute' only when that statute provides an express or implicit remedy." Currie, *Misunderstanding Standing*, 1981 Sup. Ct. Rev. 41, 44 (quoting 5 U.S.C. 702). Thus, the focus of the inquiry in this case must remain on the AMAA; and since an intent to preclude consumer challenges is found in that statute, respondents' reliance on the APA is to no avail.[2]

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approach. In our view, the preclusion question is an issue of statutory construction that logically should be decided first; if Congress intended to preclude ultimate consumers of milk products from challenging market orders, then it becomes unnecessary to consider whether these respondents have standing. See *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 456 (1974) ("[T]he threshold question clearly is whether the Amtrak Act or any other provision of law creates a cause of action whereby a private party such as the respondent can enforce duties and obligations imposed by the Act; for it is only if such a right of action exists that we need consider whether the respondent had standing to bring the action."). See also *id.* at 465 n.13.

[2]Respondents rely (Br. 41) on *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979), for their contrary argument. But the Court did not there discuss whether Chrysler had been "adversely affected or aggrieved * * * within the meaning of a relevant statute" (5 U.S.C. 702); instead, the Court considered only whether the challenged action was committed to agency discretion by law. See 441 U.S. at 317-318. That aspect of the APA's preclusion rule (5 U.S.C. 701(a)(2)) is not at issue in this case.

Where, as here, Congress has enacted a detailed and specific scheme for judicial review at the behest of particular parties, resort to the APA by persons outside that scheme would render Congress's chosen procedures meaningless. This Court has never held that the APA may be used by persons such as respondents, who are strangers to the regulatory program, to gain even greater rights to judicial review than the parties expressly accommodated in the underlying statute. It would be perverse indeed if, despite Congress's judgment that handlers should have access to the courts only after full exhaustion of administrative remedies, consumers were permitted to sue the Secretary directly under the APA. Only if the AMAA failed to authorize judicial review of market orders by any party would it make sense to rely on the APA to "fill the gap" created by the statute's silence. Here, however, respondents ask the Court to sanction use of the APA as a means of circumventing Congress's decision that handlers are the proper parties to challenge market orders and then only after they have followed the prescribed administrative procedures. Such a result would be inconsistent with a long line of this Court's decisions rejecting analogous efforts to frustrate carefully constructed congressional schemes for orderly administrative and judicial review. See Pet. Br. 28-29.

Respondents also choose to ignore the fact that the question in this case is party preclusion, not issue preclusion. It is undisputed that a handler, by following the procedures prescribed in the AMAA, may obtain judicial review of the Secretary's market orders.[3] As Judge Scalia recognized in

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[3]Accordingly, respondents' reliance (Br. 37) on *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), is misplaced. There, the Court rejected the Secretary of Labor's contention that Congress meant to prohibit *all* judicial review of his decision not to file suit to set aside an election under Section 402 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 482. *Dunlop*, 421 U.S. at 567, 568.

his dissenting opinion below, "the whole premise" of the liberalized notions of judicial review upon which respondents rely has no applicability when there is a "direct and immediate beneficiary class which can be relied upon to challenge agency disregard of the law" (Pet. App. 38a).[4] With the focus properly on party preclusion, it is clear that the cases cited in our opening brief (at 17-18) and relegated by respondents to a footnote (Br. 42 n.42) are indeed directly relevant. The fundamental problem with respondents' lawsuit is that they are attempting to litigate the rights of handlers, the parties subject to the market orders in question. Respondents themselves are nowhere included in the statutory scheme for the marketing of agricultural commodities, and their interests are entirely derivative of the interests of handlers and producers. There is thus no need to infer a cause of action on their behalf.[5] Indeed, the Court has recently applied the same principle even though

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[4]As respondents note (Br. 39 n.39), Judge Scalia dissented on the theory that respondents lack standing to maintain this action. But his observations with respect to standing are equally pertinent to the party preclusion inquiry in this case.

[5]Respondents rely (Br. 41-42) on *Blue Shield* v. *McCready*, 457 U.S. 465 (1982), and *Reiter* v. *Sonotone Corp.*, 442 U.S. 330 (1979), for the proposition that foreseeable beneficiaries of competition have standing to enforce the antitrust laws. But the antitrust plaintiffs in those cases brought suit under Section 4 of the Clayton Act, 15 U.S.C. 15, which authorizes a private damages action to be brought by "*[a]ny person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" (emphasis added). The judicial review provision contained in the AMAA is not even remotely comparable in scope. Moreover, respondents overlook the Court's characterization of *McCready* and *Reiter* in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, No. 81-334 (Feb. 22, 1983), slip op. 11 n.19: "In each of those cases * * * the actual plaintiff was directly harmed by the defendants' unlawful conduct." In this case, by contrast, respondents are unable to demonstrate any actual, direct harm to themselves as a result of the Secretary's regulations. See Pet. Br. 46-49 and pages 15-17, *infra*.

the parties precluded from bringing suit were within the class specifically protected by the statute. See *Daily Income Fund, Inc.* v. *Fox*, No. 82-1200 (Jan. 18, 1984), slip op. 17-18 (citation omitted) (The statute's "express provision for actions by security holders * * * ensures that, even if the company's directors cannot bring an action in the fund's name, the company's rights under the statute can be fully vindicated by plaintiffs authorized to act on its behalf. For this reason, it is unnecessary to infer a right of action in favor of the corporation in order to serve the statute's 'broad remedial purpose.' "). Here, too, it is unnecessary to infer a right of review in favor of respondents because their interest in challenging market orders can be fully vindicated in litigation brought by handlers.

b. Respondents also argue (Br. 37-41) that consumer suits should be permitted because the courts have allowed producers to challenge market orders even though producers, unlike handlers, have not been granted an express right of judicial review. Respondents recognize (Br. 17) that producers and consumers do not have "equally intimate interests" in regulations issued under the AMAA, but they contend that it is sufficient that consumers share one characteristic in common with producers—neither are handlers (Br. 41). This simplistic assertion ignores the substantial distinctions between producers and consumers.

At the outset, it must be emphasized that the only time this Court has sanctioned a producer suit under the AMAA was in *Stark* v. *Wickard*, 321 U.S. 288 (1944). Respondents do not dispute the fact that the Court's decision in that case turned on the existence of the producers' "definite personal rights" that were "not possessed by the people generally" (*id.* at 304, 309 (footnote omitted)). Nevertheless, respondents assert (Br. 38) that "the overwhelming case law" recognizes the right of producers to challenge any aspect of milk

market orders even if their proprietary interests are not affected. The two lower court decisions relied upon by respondents for this assertion (Br. 38) do not advance their cause.

In *Suntex Dairy* v. *Bergland*, 591 F.2d 1063 (5th Cir. 1979), the court permitted producers to challenge an order of the Secretary that merged six separate milk market orders into one. The effect of the merger was to redistribute income among the producers; the plaintiff producers saw their income lowered because the merger reduced the "blend price" they previously had received for their milk. In these circumstances, the court found the producers' complaint legally indistinguishable from the situation in *Stark*. Significantly, the court emphasized the fact that "[p]roducers * * * have a definite and direct economic stake in a milk market order, distinguishing them from consumers * * *" (591 F.2d at 1067 n.3).

In *Consolidated-Tomoka Land Co.* v. *Butz*, 498 F.2d 1208 (5th Cir. 1974), the court found that more than one-third of the votes cast in a producer referendum pursuant to 7 U.S.C. 608c(8) had been cast by a cooperative not entitled to vote in the referendum. The court specifically approved the district court's finding that it was impossible to determine whether the requisite number of qualified producers had voted for the imposition of the market order at issue (498 F.2d at 1209). Quite clearly, the invalid election completely thwarted Congress's intention that producers should not be subject to a market order unless the producers themselves give their approval. And since the order effectively limited the ability of the plaintiff producers to sell their crop (see 7 C.F.R. Pt. 914 (1971)), their "definite personal rights" were affected.

As the court in *Suntex Dairy* recognized, consumers can demonstrate no such interference with their rights for the simple reason that the Act was not intended to give them

any enforceable rights. Thus, the one common characteristic shared by producers and consumers — neither are handlers — is plainly insufficient to bring respondents within the rationale of *Stark* and its progeny.[6]

c. In the only consumer challenge to a market order of which we are aware, the court held that congressional intent to preclude consumer suits under the AMAA must be inferred from the statutory purposes. *Rasmussen* v. *Hardin*, 461 F.2d 595 (9th Cir.), cert. denied, 409 U.S. 933 (1972). Respondents contend that *Rasmussen* was "wrongly decided" and that it "has not been followed by the Ninth Circuit or in the holdings of other courts" (Br. 38). This argument is specious. Until respondents filed suit in the instant case, *Rasmussen* had so clearly established the law on the subject of congressional intent to preclude consumer challenges to milk market orders that no other consumer suits had been brought. Thus, no other courts had occasion even to consider departing from *Rasmussen*.[7]

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[6]Respondents also cite (Br. 38 n.37) two cases for the proposition that courts have allowed entities that were neither producers nor handlers to challenge market orders issued under the AMAA. *Harry H. Price & Sons, Inc.* v. *Hardin*, 425 F.2d 1137 (5th Cir. 1970), cert. denied, 400 U.S. 1009 (1971); *Walter Holm & Co.* v. *Hardin*, 449 F.2d 1009 (D.C. Cir. 1971). The cases are plainly distinguishable. In each case, the plaintiffs were handlers of tomatoes imported from Mexico. Although they were not directly governed by the challenged market orders, they were subject to the same restrictions as handlers of domestic tomatoes because the regulations resulted in automatic import restrictions that paralleled the domestic regulations. See 7 U.S.C. 608e-1. Thus, the plaintiffs in each case were putative handlers under the AMAA because their handling of imported tomatoes was directly affected by the regulations applicable to handlers of domestic tomatoes. In any event, neither case discussed the issues of preclusion of review or exhaustion of administrative remedies; from the opinions, it appears that those issues were not raised.

[7]The cases respondents cite (Br. 38) to suggest that the Ninth Circuit itself would no longer adhere to *Rasmussen* involved fundamentally different circumstances. In both *Kitchens* v. *Dep't of Treasury, Bureau*

d. We demonstrated in our opening brief (at 25-29) that sanctioning consumer suits would effectively eviscerate the administrative exhaustion requirements imposed on handlers because, as happened in this case, handlers would need only align themselves with consumers or frame their complaint in their capacity as consumers of milk rather than handlers in order to by-pass the administrative process.[8] Respondents offer several unpersuasive arguments in response to our contention.

First, respondents argue (Br. 44) that "circumvention in * * * cases [brought by producers] would be much more likely to occur [than in cases brought by consumers] since many handlers are also producers." Respondents cite *Dairylea Cooperative, Inc.* v. *Butz*, 504 F.2d 80 (2d Cir. 1974), a suit brought by an association of producers that also acted as a milk handler. Respondents totally ignore the fact that the court allowed the association to proceed without first exhausting its administrative remedies because the only

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of Alcohol, Tobacco & Firearms, 535 F.2d 1197 (9th Cir. 1976), and *County of Alameda* v. *Weinberger*, 520 F.2d 344 (9th Cir. 1975), the plaintiffs sued to protect their own direct interests, which were not derivative of the interests of any other party directly regulated or affected by the statutes in question.

[8]Respondents note (Br. 44 & n.44) that handlers apparently financed the producer suit permitted in *Stark* v. *Wickard, supra*. Although we have not inquired, we assume that the individual consumer respondents in this case also have not financed the litigation themselves. Clearly, the costs of the administrative proceedings and this litigation would far exceed any savings the three consumer respondents could possibly hope to obtain in future milk purchases for their personal consumption. (The Department of Agriculture estimated that adoption of respondents' proposal might result in per capita savings of 82 cents per year (J.A. 61).) In any event, the fact that handlers may be financing litigation that they cannot bring themselves is certainly no reason to expand the class of persons entitled to bring such suits. On the contrary, it suggests a strong need to adhere closely to the statutory scheme to prevent further erosion of Congress's intent.

interest it asserted in the litigation was that of the producers it represented (504 F.2d at 83 (emphasis added; citation omitted)):

> *It is true that Dairylea has acted as a handler* * * *, but it is not acting as such in this case.* * * * The concern of Dairylea in this action is not the money which it paid into the Producer-Settlement Fund, since its total payments will remain constant whatever the outcome of the case, but with the money collected on behalf of its producer-members as authorized by 7 U.S.C. § 610(b)(1) (1970) which will increase if the action succeeds. *Thus, for purposes of this suit, Dairylea must be deemed a producer suing in its representative capacity* * * *.

Thus, *Dairylea Cooperative* was not a case of handler-producer collusion intended to by-pass the administrative exhaustion requirements.[9]

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[9]Although Dairylea's hybrid status was thus irrelevant to the particular action it sought to maintain, it is worth noting that the court was not particularly pleased that the association's status as a producer meant that it need not exhaust statutory administrative remedies (504 F.2d at 82-83):

> We reluctantly conclude that Dairylea is a producer and as such was not required to exhaust any administrative remedy before invoking the jurisdiction of the District Court and indeed had no administrative remedy to exhaust. Considering the complicated nature of the provisions of the Act and the labyrinthian regulations issued thereunder, it would be most appropriate for Dairylea's complaint to be considered first by the Secretary * * *. While a remand is most inviting and would permit a dismissal of the complaint without reaching the merits, we regretfully find no authority which would justify such action.

The court's lament hardly constitutes a ringing endorsement for any expansion of the class of non-handlers entitled to maintain challenges to market orders.

Second, respondents argue (Br. 45) that it is actually in a handler's interest to pursue the statutory administrative remedies prior to bringing suit. If this were really so, one must ask why Joseph Oberweis (the handler in this case) failed to exhaust his administrative remedies (see Pet. App. 31a-33a) prior to aligning himself with consumers whose complaint the court of appeals ordered to be heard without regard to the statutory exhaustion requirements.

More fundamentally, respondents have provided an incomplete description of the statutory scheme. Citing 7 U.S.C. 608c(14), respondents contend (Br. 45 (footnote omitted)) that by initiating the administrative review process prior to bringing suit a handler "may avoid any money penalties for violation of the challenged order during the pendency of his complaint before the Secretary" and "may continue his current practices unless and until the Secretary affirms the challenged regulation or initiates injunctive action against such handler." In reality, the protection afforded a handler who "continue[s] his current practices" while his administrative challenge is pending is not nearly so sweeping. Section 608c(14) provides only that no *criminal* fines authorized by that subsection may be imposed during the pendency of a good faith handler review petition filed pursuant to 7 U.S.C. 608c(15). But the subsection provides no protection against the imposition of late charges (*e.g.*, 7 C.F.R. 1004.78, 1106.78, 1108.78), and, in the fruit and vegetable area, a handler may be required to forfeit the value of any product handled in violation of a market order (7 U.S.C. 608a(5)).

Respondents' suggestion that handlers are free to continue their current practices until enjoined, while literally true, does little to bring credit to handlers. In this area as in others, voluntary compliance with existing regulations is an essential premise of our legal system. But if handlers nevertheless choose to disregard the law until enjoined, the Act

gives the Secretary ample powers to obtain such injunctions without regard to the pendency of administrative proceedings (7 U.S.C. 608a(6)). Moreover, a court reviewing the Secretary's disposition of a handler's petition for review may not interfere with the Secretary's right to seek injunctive relief. See 7 U.S.C. 608c(15)(B). Thus, it seems most unlikely that a handler would find it in his interest to disregard the terms of a market order until he was "caught" by the Secretary.

Respondents also contend (Br. 45) that deference to the Secretary's expertise should not be a consideration because the courts have managed to resolve some of the highly technical issues arising under the AMAA without benefit of the Secretary's expertise. This argument is frivolous. The fact that courts have been able to decide cases arising under the AMAA says nothing about their ability to decide such cases correctly or expeditiously; in any event, respondents' assertion is hardly sufficient justification to dispense with the Secretary's expertise when Congress has clearly indicated a contrary intent and the courts have consistently recognized the value of having the Secretary's views. See, *e.g.*, *United States* v. *Ruzicka*, 329 U.S. 287 (1946); *Dairylea Cooperative, Inc.* v. *Butz*, 504 F.2d 80 (2d Cir. 1974); *Blair* v. *Freeman*, 370 F.2d 229 (D.C. Cir. 1966).[10]

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[10]Respondents also contend (Br. 46) that their rulemaking petition offered the Secretary sufficient opportunity to apply his expertise to the issues in this case. But as we noted in our opening brief (at 27-28 n.15), the rulemaking that respondents requested would have been an entirely different proceeding from the direct judicial challenge to the regulations that the court of appeals has sanctioned. Respondents themselves must recognize the distinction, because they never sought review of the Secretary's denial of their rulemaking petition; instead, they have persisted in their attempts to litigate their challenge to the regulations directly.

2.a. As we noted in our opening brief (at 33-34), respondents alleged that the challenged market orders injure them in two ways. First, they claimed that the orders deprive them of a nutritious, low-cost substitute for regular fluid milk and, second, they claimed that the orders deprive consumers of a "stabilizing market influence" that could operate to offset seasonal fluctuations in the supply of regular fluid milk. Respondents have now abandoned any claim that they ever have been or will be subjected to seasonal shortages in the *supply* of fresh fluid milk; they contend instead that seasonal fluctuations in milk production result in seasonal *price increases* that cause them economic injury (Br. 21). Thus, respondents' "injury" is now reduced to price alone. As we demonstrated in our opening brief, however, respondents' interest in lower prices is wholly outside the zone of interests arguably protected by the AMAA.[11]

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[11]It is also noteworthy that respondents' newly-characterized "seasonal price fluctuation" argument is totally unsupported by any facts. Respondents have never offered evidence to support the notion that the retail price of fresh fluid milk is subject to seasonal variations. In fact, fluctuations over the last five years in the average retail price of fresh whole milk attributable to seasonal factors were virtually nonexistent —less than a penny per $1.00 spent for fluid milk. Bureau of Labor Statistics, U.S. Dep't of Labor, *Final Seasonal Factors for Seasonal Adjustment of Fresh Whole Milk* (Jan. 1984). This amount is plainly so insignificant that respondents cannot seriously contend that it would even be reflected in retail pricing decisions. Moreover, consumer consumption of fresh whole milk is slightly *greater* in the fall and winter, when production is lowest, than in the flush production periods of spring and summer. Consumer Nutrition Division, Human Nutrition Information Service, U.S. Dep't of Agriculture, *Report No. H-6, Food Consumption: Households in the United States, Seasons and Year 1977-78*, at 19 (June 1983). There is thus no reason to suppose that even the negligible seasonal fluctuation in retail prices that exists is solely attributable to supply factors rather than to reduced consumer demand in the spring and summer months. (We are lodging with the Court and serving on respondents' counsel copies of the pertinent pages of the reports cited in this footnote, as well as the reports cited at page 16, *infra*.)

Respondents, like the court of appeals, rely on a policy section of the AMAA that merely references consumers (7 U.S.C. 602(2)). Respondents assert (Br. 32) that their interest in lower prices for reconstituted milk is protected by that section because the provision "expresses a general policy that consumers should not pay unreasonably high prices for milk or milk products as a result of the price fixing authority conferred by the AMAA." We agree that one of Congress's concerns was to limit the Secretary's ability to increase prices to "unreasonably high" levels. What respondents choose to ignore, however, is the fact that Congress defined in the AMAA precisely what it meant by "unreasonably high prices." In the very same section of the statute relied upon by respondents, Congress stated that the Secretary was to *raise* the prices farmers receive for their milk as rapidly as possible, but that he was to protect consumers by not raising prices above the parity level (7 U.S.C. 602(2)). We noted in our opening brief (at 35-36 n.21) that the market order minimum prices for fresh fluid milk have rarely, if ever, reached parity, and that during the entire pendency of this litigation those prices have been below parity. Respondents do not dispute this point. Thus, their interest in reducing prices below the level that Congress has directed the Secretary to achieve is clearly *not* protected by the statute; on the contrary, they seek to force the Secretary to disregard the congressional directive to *raise* producer prices until parity is achieved. Essentially, respondents are asking the courts to define "reasonable" prices for milk and milk products when Congress has already done so in the statute. This would be inappropriate in any circumstances, but it is clearly impermissible as a basis for standing when respondents are unable to allege that the Secretary has exceeded the statutory definition of reasonable prices.

Respondents' reliance on the other policy section of the AMAA that references consumers (7 U.S.C. 602(4)) is even more misplaced. Respondents contend (Br. 33) that the

Senate Report on this section, which was added to the AMAA in 1954, demonstrates Congress's concern with "problems of unreasonable fluctuations in supplies and prices when there was a discontinuity in the operation of marketing agreements and orders." Respondents are correct about the purposes of the provision, but, inexplicably, they ignore the fact that Congress's response to the problem of discontinuity was to grant the Secretary new authority to raise producer prices *above* parity if necessary to maintain orderly marketing conditions. See S. Rep. 1810, 83d Cong., 2d Sess. 8 (1954); Pet. Br. 40.

It is thus clear, and respondents do not really contend otherwise, that respondents' interests are antithetical to the interests Congress sought to promote in the AMAA.[12] Respondents' answer (Br. 35) is to assert that this Court has permitted parties other than the primary beneficiaries of a statute to challenge agency action under the statute. But our position is not that a statute's zone of interests is limited to

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[12]Respondents twice cite (Br. 8, 30) *Schepps Dairy, Inc.* v. *Bergland*, 628 F.2d 11, 19 (D.C. Cir. 1979) (footnote omitted), in which the court observed that one purpose of the AMAA is "to protect the health and purses of consumers." But the court's authority for this statement was a citation to 7 U.S.C. 602(2) and 608c(18). *Schepps Dairy*, 628 F.2d at 19 n.57. We have discussed Section 602(2) above and shown that it does not embrace respondents' interest in lower prices. The same is true of Section 608c(18). That subsection was intended to make it "explicit that prices in Federal milk orders should be set at levels not only to insure adequate supplies of high quality milk currently, but that price levels established should be such as to assure a level of farm income adequate to maintain the productive capacity in dairying needed to meet anticipated future needs." H.R. Rep. 93-337, 93d Cong., 1st Sess. 63 (1973). Again, therefore, Congress's focus was on protection for farmers' income. Congress intended such protection to benefit consumers by ensuring that they have adequate supplies of wholesome milk; it did not intend for them to upset the system by attempting to lower farmers' income. In any event, *Schepps Dairy* was not a consumer suit; it was filed by a handler who had first exhausted the statutory administrative remedies (see 628 F.2d at 13 & n.2).

"primary beneficiaries"; instead, we contend only that parties who ask the courts to grant them relief that Congress expressly denied cannot logically be thought to fall within the statute's zone of interests. See Pet. Br. 41-43.[13]

b. Respondents also have failed to demonstrate that their asserted injury is likely to be redressed by a decision in their favor. All that respondents are able to allege is that elimination of the challenged regulations would likely make it economically feasible for handlers to manufacture reconstituted milk; they have not shown that a change in the regulations is likely to induce handlers to sell the product they seek or, more importantly, that any cost savings realized by handlers would be passed on to consumers. As demonstrated in our opening brief (at 47-49), these factors are beyond the control of the Secretary no matter how he regulates the price farmers receive for milk used to make reconstituted fluid milk. Indeed, respondents themselves illustrate some of the problems involved by their reliance (Br. 2 n.1) on the experience in an unregulated market in North Carolina. There, a fortified reconstituted milk product achieved consumer acceptance and sold well for several years. But in 1980, the manufacturer simply decided to stop

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[13]In any event, respondents mischaracterize the two decisions of this Court upon which they rely. In both *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970), and *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), the Court construed Section 4 of the Bank Service Corporation Act of 1962, 12 U.S.C. (1976 ed.) 1864 (repealed 1982), as providing protection for competitors of national banks. (The statute provided that "[n]o bank service corporation may engage in any activity other than the performance of bank services for banks."). Thus, contrary to respondents' contention (Br. 35 (footnote omitted)), the Bank Service Corporation Act was not "a statute concerned only with the well-being of banks." The provisions of the AMAA implicated in this litigation, on the other hand, are indeed concerned solely with the well-being of farmers. Respondents' inability to allege that the Secretary has provided greater protection for farmers than the AMAA mandates is thus fatal to their zone of interests argument.

making it (45 Fed. Reg. 75960 (1980)), a decision for which the Secretary had no responsibility whatsoever.[14]

Respondents rely on the Smith affidavits (J.A. 64-68, 76-81) to support their allegation that the current regulations make it uneconomical for handlers to manufacture reconstituted milk. Assuming, arguendo, that Smith's conclusions are correct (but see J.A. 69-73), nevertheless there is no reason to believe that any savings realized by handlers would be passed on to consumers. The Smith affidavits do not speak to this point, which is crucial to any showing of redressability. As we noted in our opening brief (at 47), Congress was fully aware of the fact that declines in the prices received by farmers do not ordinarily result in reductions in the price of consumer products; instead, handlers generally keep for themselves the savings that respondents seek at the retail level. See, *e.g.*, 77 Cong. Rec. 1394, 1726, 1729 (1933). And price differentials among milk retailers have very little to do with cost; most often, retail price differentials reflect different merchandising policies, such as the use of milk as a loss leader. See Economic Research Service, U.S. Dep't of Agriculture, *Agricultural Economic Report No. 207, Pricing Milk and Dairy Products — Principles, Practices, and Problems* 21 (June 1971). Finally, a number of states control the price of milk at the retail level, even though the federal government does not. See Economic Research Service, U.S. Dep't of Agriculture, *DS-386, Dairy — Outlook and Situation* 26 (Sept. 1981). Taken

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[14]We doubt that the Alaskan experience, upon which respondents also rely (Br. 2 n. 1), is typical of conditions that might be expected in the lower 48, where respondents reside. Food prices in Alaska are unique because so many commodities must be obtained from markets outside the State. Thus, reconstituted milk in Alaska is sold "at about the same price as prepackaged fresh milk shipped from the continental U.S." 45 Fed. Reg. 75960 (1980).

together, these factors make respondents' claim of redressability as defective as the ones rejected by this Court in *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 43 (1976), and *Warth* v. *Seldin*, 422 U.S. 490, 502-508 (1975).

Respondents also rely (Br. 23-25), as did the court of appeals, on the Department of Agriculture's preliminary impact analysis of respondents' proposal (45 Fed. Reg. 75956 (1980)). But as we pointed out in our opening brief (at 47-49), the impact statement assumed that all independent, intervening variables necessary to establish respondents' claim of redressability would operate to the benefit of consumers.[15] While this may have been a useful assumption for purposes of discussion, it leaves respondents' assertion of redressability "at best speculative and at worst nonexistent." *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 480 n.17 (1982). Moreover, the potential savings for consumers discussed in the impact statement represent theoretical nationwide savings for all consumers of all milk over a three-year period. Respondents have no guarantee that they themselves would share in the projected savings, as if in a trust fund. Plainly, the impact statement is insufficient to confer standing on these respondents.

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[15] Respondents contend (Br. 24-25) that the discussion of the impact statement in our opening brief constitutes an attempt to disavow the Secretary's own document. That is clearly not the case. The impact statement itself repeatedly made clear the speculative nature of any benefits to consumers, and in our brief we simply showed that, in these circumstances, the court of appeals erred in giving the statement's speculations controlling weight.

For the foregoing reasons, and the reasons set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

APRIL 1984

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